No. 23-621

In The
Supreme Court of the United States

GERALD F. LACKEY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

DAMIAN STINNIE, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Br. of FIRE, *et al.* Supp. Pet'r, *N.R.A. v. Vullo*, No. 22-842, 602 U.S. 175 (filed Jan. 16, 2024); Br. of FIRE Supp. Pet'rs in No. 22-555 & Resp'ts in No. 22-277, *Moody v. NetChoice, LLC*, 144 S. Ct. 2393 (filed Dec. 6, 2023).

In lawsuits across the United States, FIRE seeks to vindicate First Amendment rights without regard to the speakers' political views. FIRE's clients rely on swift access to federal courts, often moving for

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

preliminary injunctions to secure meaningful and lasting legal remedies for the irreparable harm of censorship. *See, e.g.*, *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605 (9th Cir., Aug. 3, 2023) (affirming preliminary injunction); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023) (granting preliminary injunction).

The **First Amendment Lawyers Association (FALA)** is an Illinois nonprofit corporation with some 150 members throughout the United States, Canada, and Europe. Its membership consists of attorneys whose practices emphasize the defense of First Amendment rights and related civil liberties. For more than half a century, FALA members have litigated cases concerning a wide spectrum of such rights, including free expression, free association, defamation, and related privacy issues. FALA has frequently appeared as *amicus curiae* before numerous state and federal courts to provide its unique perspective on some of the most important First Amendment issues of the day. *See, e.g.*, Br. of FALA Supp. Pet'rs, *Masterpiece Cakeshop v. Colo. Civil Rights Comm.*, No. 16-111, 584 U.S. 617 (filed Sept. 7, 2017); Br. of FALA Supp. Resp't, *Lee v. Tam*, No. 15-1293, 582 U.S. 218 (filed Dec. 16, 2016).

SUMMARY OF ARGUMENT

Plaintiffs-Respondents brought this case against the Commissioner of Virginia's Department of Motor Vehicles to vindicate their constitutional rights, and they succeeded. This case was fully litigated—indeed, as this brief will show, it was as fully litigated as any number of civil-rights cases could be. After multiple rounds of defeats, the government threw in the towel. But the Commissioner now wants to avoid the consequences of his loss. The Fourth Circuit was unreceptive, and rightly so.

The trial court originally dismissed this case under Rule 12(b)(1), but the Fourth Circuit reversed. *Stinnie v. Holcomb*, 77 F.4th 200, 203 & n.1 (4th Cir. 2023). Plaintiffs-Respondents then successfully moved for a preliminary injunction. *Id.* Yet after cross-motions for summary judgment, and just before trial, the Commissioner sought a stay pending a legislative resolution. That resolution passed—so the case is now moot. *Id.* And if the Commissioner had his way, Plaintiffs-Respondents would be left high and dry.

A similar story lies for First Amendment cases across the country. The government violates the First Amendment, litigates a case until suffering defeat at the preliminary-injunction stage, then gives up the

ghost. Withholding attorney's fees from victims of these First Amendment violations would be devastating—not just for them individually, but for access to justice more broadly. This runs counter to Congress' primary motivation for Section 1988: encouraging citizens and their attorneys to defend constitutional rights against government abuse. Letting the government off scot-free will only embolden such abuses and make them harder to fight, for two primary reasons.

First, many civil-rights cases, but especially First Amendment cases, conclude naturally at the preliminary-injunction stage. The effectiveness of speech and even the ability to speak at all can be time sensitive. Preliminary injunctions are often the only relief available to many plaintiffs. Barring fee recovery for cases concluding in preliminary injunctions would be tantamount to prohibiting *any* fee recovery for a large swathe of civil-rights cases. Along with those fees goes any shot at securing competent counsel.

Second, the threat of fees keeps government defendants honest. Without fee-shifting, governments know their victims will struggle to find counsel to defend against unconstitutional behavior. That violates Section 1988's stated purpose, "to attract

competent counsel" to civil-rights cases. *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (quoting S. Rep. No. 94–1011, at 6 (1976)). It also creates perverse incentives. Governments will strategically moot cases after preliminary injunctions. Enjoined government defendants can simply change policies and make cases disappear free of charge, leaving the plaintiff to foot the litigation bill. They will similarly defend blatantly unconstitutional policies, taking their chances in litigation until just after issuance of a preliminary injunction (and any interlocutory appeals). This not only contradicts Section 1988's main purpose, but also acts as a drain on court resources. This Court should therefore affirm the Court of Appeals' decision reversing the denial of attorney's fees.

ARGUMENT

I. Many Civil-Rights Cases—Especially First Amendment Cases—Conclude After a Preliminary Injunction.

Amici are First Amendment litigators and advocates intimately familiar with how civil-rights cases proceed. The fact is they often end after the preliminary-injunction stage. Most speech isn't relevant forever, and if a case's long windings through the court system make that speech obsolete, litigants have no real recourse for violations of their First

Amendment rights. That's why "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

A. Because speech delayed is often speech destroyed, preliminary injunctions are critical to protecting free expression.

As any journalist, speechwriter, or comedian can attest: Timing is everything. *See Bridges v. California*, 314 U.S. 252, 268 (1941) ("public interest is much more likely to be kindled by a controversial event of the day"). That's even truer in our social-media-fueled news cycle. Studies have shown news on social media "circulates faster, fades faster," and that "audiences may encounter faster shifts in focus [and] less attention to each news event."[2]

"The timeliness of political speech," this Court has recognized, "is particularly important." *Elrod*, 427 U.S. at 374 n.29. "A delay of even a day or two may be of crucial importance in some instances." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968). Thus, "[s]peech delayed may be speech

[2] William Brannon & Deb Roy, *The speed of news in Twitter (X) versus radio*, 14 Sci. Reps., No. 11939 (2024), https://doi.org/10.1038/s41598-024-61921-7.

destroyed; political speech . . . often is addressed to transitory issues, and becomes stale when the issues pass away." *A.C.L.U of Ill. v. City of St. Charles*, 794 F.2d 265, 274 (7th Cir. 1986); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (Brennan, J., concurring) ("delay . . . could itself destroy the contemporary news value of the information").

Any government-imposed delay on speech threatens to make government the final arbiter of acceptable speech. The First Amendment requires "*prompt* judicial review" of restrictions on speech, lest, "by reason of delay or otherwise, [government] determination[s] may in practice be final." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561–62 (1975) (emphasis added).

For those reasons, the First Amendment protects the right to speak *without delay*. Our legal tradition has long abhorred "previous restraints" that might forestall or otherwise chill speech. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (quoting 4 William Blackstone, *Commentaries* *151–52). This Court rigorously scrutinizes temporary restrictions on speech, even those purported to uphold other constitutional rights. *See Neb. Press Ass'n*, 427 U.S. at 543, 570 (invalidating as unconstitutional court order

banning reporting on case "until jury was impaneled").

Preliminary injunctions play a crucial part in First Amendment jurisprudence. "[C]aselaw clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Preliminary injunctions are especially well-suited to addressing potential violations where "ongoing enforcement of the potentially unconstitutional regulations would infringe . . . free expression interests." *Id.* (quotation marks omitted). This rationale extends to all First Amendment freedoms, not just those of speech or the press: "If preliminary injunctions were not available in cases brought to enforce the establishment clause, government might be able to erode the values that the clause protects with a flood of temporary or intermittent infringements." *A.C.L.U. of Ill.*, 794 F.2d at 275.

If it's likely a defendant has violated the First Amendment, courts typically consider the remaining preliminary-injunction elements satisfied.[3] First

[3] To successfully move for a preliminary injunction, First Amendment plaintiffs must show "that their First Amendment

Amendment violations *always* impose irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (quoting *Elrod*, 427 U.S. at 373). And "injunctions protecting First Amendment freedoms are *always* in the public interest." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012) (quoting *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006)) (emphasis added). Federal courts thus recognize that, "[i]n the First Amendment area, summary procedures are even more essential." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).[4]

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claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). In First Amendment cases, *Winter*'s "balance of equities" often collapses into the public interest analysis. *See, e.g.*, *Ramirez v. Collier,* 595 U.S. 411, 434 (2022) ("the balance of equities and the public interest favor his requested relief").

[4] Courts also often issue preliminary injunctions in First Amendment cases without the usual requirement that the moving party post security. *See, e.g.*, *Sutton v. Evans*, 918 F.2d 654, 655–56 (6th Cir. 1990).

Speech must be timely to be effective. Preliminary injunctions are thus tailor-made for addressing likely violations of the First Amendment.

B. First Amendment cases are often won or lost at the preliminary-injunction stage.

Because First Amendment cases are so well-suited for preliminary injunctions, they often resolve at that stage of the proceedings. A successful movant must establish likelihood of success after legal argument and the presentation of evidence, whether at a hearing or on the papers. *See* 11A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2949 (3d ed. June 2024). Preliminary-injunction proceedings thus provide a window into plaintiffs' chances at ultimately prevailing in the case—especially when so much of the evidence presented will reappear on the merits. *See id.* § 2950. Unsuccessful litigants can even appeal, 28 U.S.C.A. § 1292(a)(1), previewing how appellate courts may see each side's claims.

All told, the parties vigorously litigate the preliminary-injunction stage. And those on the losing end rightly intuit their diminished odds for victory. The wise ones try to get out of Dodge.

That's what happened following this Court's seminal decision in *Elrod v. Burns*. There, a plurality of this Court held a sheriff's office patronage system, which hired and fired employees based on political view, violated the First Amendment. 427 U.S. at 373. The plaintiffs had therefore demonstrated likelihood of success on their claims, and the Court affirmed that the district court should have granted a preliminary injunction. *Id.* at 374. On remand, the case was effectively over. The district court entered the injunction, and then, "[b]efore the case went to trial, the parties reached a tentative settlement." *Burns v. Elrod*, 757 F.2d 151, 152 (7th Cir. 1985). Further litigation concerned only class-settlement procedures. *See id.* at 154.

Even if litigants do not quit after the resolution of preliminary-injunctive relief, sometimes so much time will have passed as to moot the litigation. This is exactly what *amicus* FIRE has seen in its own work, particularly on university campuses. Students' claims for prospective declaratory or injunctive relief evaporate at graduation. Restrictions on student speech often do not inflict financial injuries, so compensatory damages may not be available or may be difficult to prove. *See* Part II.A., *infra*. That means the only practical relief—injunctive—is also the most time-sensitive.

The median length of time for resolution of a civil case in federal district court is between 7.8 and 35.4 months, depending on whether the case goes to trial.[5] For students, that means claims are regularly mooted by graduation. Take *Board of School Commissioners of Indianapolis v. Jacobs*, where this Court held graduation mooted students' declaratory judgment claims that school officials unconstitutionally restricted a student newspaper. 420 U.S. 128, 129 (1975) (per curiam). Because the students had graduated, there was "no longer" a "case or controversy . . . between the named plaintiffs and the [school board] with respect to the validity of the rules at issue." *Id.* Lower courts have held the same in other cases concerning students' First Amendment rights.[6]

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[5] See Administrative Office of the U.S. Courts, United States District Courts—National Judicial Caseload Profile (March 31, 2024), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2024.pdf.

[6] *See, e.g.*, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (valedictorian's graduation mooted her equitable-relief claims challenging graduation-speech policy); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 791–98 (9th Cir. 1999) (en banc) (graduation mooted declaratory and injunctive-relief claims against policy permitting student prayers during graduation ceremony); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (graduation mooted students' equitable-relief claims challenging prohibition on sectarian graduation speeches); *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (graduation

Colleges and universities can—and in *amici*'s experience do—take advantage of this reality to insulate themselves from liability by prolonging litigation until student-plaintiffs graduate.

With so many Section 1983 cases ending after preliminary injunctions, Section 1988 can serve Congress's purposes only if attorney's fees are available after those injunctions. Ruling otherwise would create a massive exception to Section 1988: Attorney's fees would be unavailable in civil-rights cases that move quickly, or that are time-constrained and must move quickly. As explained next, such a loophole—besides conflicting with the statute's intent—would also hamper access to justice.

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mooted students' declaratory- and injunctive-relief claims challenging policy allowing student-initiated prayer at graduation ceremonies); *Fox v. Bd. of Trustees of State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) (graduation mooted equitable relief claims challenging regulation preventing cookware demonstration in university dormitory); *Sapp v. Renfroe*, 511 F.2d 172, 175 (5th Cir. 1975) (graduation mooted equitable-relief claims challenging mandatory ROTC training).

II. Barring Attorney's Fees for Preliminary Injunctions Will Raise the Cost of Vindicating First Amendment Rights, Encourage Strategic Mootness, and Promote Needless Litigation.

With so many First Amendment cases ending after a preliminary injunction, it is no wonder Courts of Appeals "have little difficulty finding prevailing party status in such circumstances." *Stinnie*, 77 F.4th at 215. Though "preliminary" in name, the relief is effectively permanent. Whatever "haggling over fees" may have concerned the dissent below, *id.* at 230 (Quattlebaum, J., dissenting), the alternative is worse.

That is so in at least three ways. *First*, it substantially raises the costs of vindicating First Amendment rights. Because so many First Amendment cases effectively end after preliminary-injunction proceedings, eliminating fees for successful motions eliminates any prospect of fees at all. And without fees, plaintiffs will struggle to find or afford competent counsel. *Second*, removing the threat of fees will encourage preliminarily enjoined defendants to strategically moot cases to avoid fees, with no real intention of permanently ceasing the enjoined conduct. This poses a particular hazard in cases against municipalities or colleges, which can often

enact, retract, and re-enact policies with impunity. *Third*, for similar reasons, eliminating the prospect of fees will encourage unnecessary litigation and appeals. Fees incentivize defendants to consider the costs of litigation in the first place, or of further litigation on appeal. The threat of litigation carries less weight when fees are off the table.

A. Many First Amendment Practictioners Depend on Fee-Shifting to Take Cases.

"Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights." *Perdue v. Kenny A.*, 559 U.S. 542, 559 (2010). It does this by "attract[ing] competent counsel" to civil-rights cases. *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (quoting S. Rep. No. 94–1011 (1976)).

Attorney's fees are critical in First Amendment cases, where monetary awards may be limited or nonexistent and the only real relief is injunctive. Free speech is often "not readily reducible to a sum of money." *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 765 (8th Cir. 2008). There is accordingly only an uncertain basis, at best, for contingency fee agreements. This leaves attorney's fees as the only "incentive to attorneys to represent civil-rights

litigants whose claims may not result in substantial monetary compensation." *Gray v. Bostic*, 720 F.3d 887, 897 (11th Cir. 2013) (citing *O'Connor v. Huard*, 117 F.3d 12, 18 (1st Cir.1997)).

Many practitioners therefore rely on fees to take First Amendment cases, even ones destined to end after preliminary injunctions. In one case litigated by a member of *amicus* FALA, the trial court granted a preliminary injunction as to some relief while leaving undecided other potential issues. *Davis v. City & Cnty. of San Francisco*, 135 F. Supp. 3d 1053, 1059 (N.D. Cal. 2015). But even this partial preliminary injunction decided the meat of the case: The plaintiff political activists needed a permit for a march scheduled the very next weekend. *Id.* at 1055. After the court's decision—handed down one day before the event—the parties settled the case for attorney's fees. *Amicus* FIRE likewise has resolved cases after preliminary injunctions. Following a preliminary injunction and its associated appeal, FIRE recently entered a settlement agreement that included $250,000 in attorney's fees and costs.[7]

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[7] *Flores v. Bennett—Settlement Agreement*, https://www.thefire.org/research-learn/flores-v-bennett-settlement-agreement; *see also Flores v. Bennett*, No. 1:22-cv-01003-JLT-

Those settlements were possible because attorney's fees were a live issue following the preliminary injunction. And, importantly, such settlements provide an incentive for competent attorneys to take these cases. If government defendants could avoid paying fees simply by ceasing their activities after an injunction issues, there would be little incentive for private attorneys to take these sorts of cases.

Section 1988 is not a get-rich-quick scheme for the plaintiffs' bar. "Congress intended that statutory fee awards be adequate to attract competent counsel, but not produce windfalls to attorneys." *City of Riverside*, 477 U.S. at 580. Congress merely acknowledged the reality that, without fee-shifting, many meritorious constitutional claims will go unlitigated. Fee-shifting "encourage[s] access to the courts to redress often economically unviable injuries to fundamental rights." *Bravo*, 810 F.3d at 668 (citing *City of Riverside*, 477 U.S. at 574–77). It is a matter of "effective access to the judicial process." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). As so much First Amendment litigation happens at the preliminary-

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HBK (E.D. Cal., Aug. 4, 2024) (Doc. 74) (granting stipulated judgment).

injunction stage, barring fees means less access to the judicial system and, ultimately, jeopardizes constitutional rights.

B. Without the threat of fees, government defendants will strategically moot cases.

Fees incentivize good behavior. If the government enforces an unconstitutional policy, it knows it's on the hook after losing in court. But if it can quickly moot any cases without the threat of fees, it will have little incentive not to enforce unconstitutional policies. Preliminary injunctions give the government a sneak peek at the constitutionality of its policy. Without fees, if it loses, the government can simply change its policy and make the litigation disappear, free of charge—or, put differently, saddle the plaintiff with the cost of vindicating constitutional interests.

Amicus FIRE has witnessed precisely that with colleges and universities, which will strategically moot cases by revising or disavowing policies after the start of litigation. One such policy change mooted students' claims even though the college expressly refused to commit to the change "indefinitely into the

future." *Husain v. Springer*, 193 F. Supp. 2d 664, 670 (E.D.N.Y. 2002), *aff'd*, 494 F.3d 108 (2d Cir. 2007).[8]

Students' constitutional claims against public entities are vulnerable to strategic mootness because courts more readily accept government claims of repentance. Granted, the general rule is voluntary cessation of a policy moots a case only if "there is no reasonable expectation . . . that the alleged violation will recur." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up). But courts apply "a rebuttable presumption that the objectionable behavior will *not* recur" when a governmental defendant voluntarily rescinds a challenged policy. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004).[9] Such treatment is premised on the "good faith" and trustworthiness of government

[8] The Second Circuit reviewed the case on its merits because the students also pursued claims for nominal damages. *See Husain*, 494 F.3d at 121–34.

[9] *See also, e.g.*, *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019); *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018) ("Where that party is the government we presume that it acts in good faith."); *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009).

actors. *See, e.g.*, *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018).[10]

Yet governments do not consistently live up to this trust. Public colleges and universities in particular will reinstitute unconstitutional policies after revoking them to end litigation. After a student sued California's Citrus College, for instance, the college revoked its policies of limiting expressive activities to three small "free speech areas" and subjecting students to an advance-notice requirement—policies that are clearly unconstitutional.[11] But sometime later the college adopted a nearly identical policy.[12] It required yet

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[10] *Accord Fed'n of Advert. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) ("[W]hen the defendants are public officials . . . we place greater stock in their acts of selfcorrection, so long as they appear genuine."); 13C Wright & Miller, *supra*, § 3533.7 ("Courts are more likely to trust public defendants to honor a professed commitment to changed ways . . . .").

[11] *See* Compl. ¶ 12, *Stevens v. Citrus Cmty. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. May 19, 2003), https://www.thefire.org/complaint-against-citrus-college-may-19-2003/; *See* Resolution of the Citrus Coll. Bd. of Trs. (June 5, 2003), https://www.thefire.org/resolution-of-the-citrus-collegeboard-of-trustees-june-5-2003/.

[12] *See* Compl. ¶ 2, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. July 1, 2014), https://www.thefire.org/complaint-in-sinapi-riddle-v-citrus-communitycollege-et-al/.

another constitutional lawsuit for the college to again revise its policy.[13]

A similar pattern unfolded at Pennsylvania's Shippensburg University. There, after students challenged the university's speech code, a federal district court preliminarily enjoined its enforcement. *See Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373–74 (M.D. Pa. 2003). The university then settled the suit, agreeing to repeal the challenged policies.[14] Within five years, however, the university readopted the same policies verbatim.[15] Students challenged the speech code a second time, and yet again the university settled and agreed to revise its policies.[16]

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[13] *See* Settlement Agreement, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Dec. 3, 2014), https://www.thefire.org/settlement-agreement-sinapi-riddle-vcitrus-college/.

[14] *See* Press Release, FIRE, *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), https://www.thefire.org/a-greatvictory-for-free-speech-at-shippensburg.

[15] See Compl. ¶ 28, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. May 7, 2008), https://www.thefire.org/legal-complaint-againstshippensburg-university-2008.

[16] *See* Will Creeley, FIRE, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement*, University Once Again Dismantles Unconstitutional Speech Code (Oct. 24, 2008), https://www.thefire.org/victory-for-free-

More recent litigation against the University of Michigan's speech code shows that public entities, left unchecked, will reinstate challenged policies. In *Speech First, Inc. v. Schlissel*, a group of students challenged the university's prohibition against "bullying and harassing behavior," which the university defined as including "annoy[ing]" someone "persistently," or "frighten[ing]" a "smaller weaker person." 939 F.3d 756, 762 (6th Cir. 2019). Although the university rescinded the challenged restriction, in part because of the lawsuit, it "continue[d] to defend its use of the challenged definitions" and refused to make a commitment not to reenact them. *Id.* at 769–70. The district court denied a preliminary injunction, but the Sixth Circuit vacated that denial, holding the university had "simply not [provided] a meaningful guarantee" its new definitions "will remain the same in the future." *Id.* at 769, 771. Only after the appellate ruling did the university promise not to reinstate its policy.[17]

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speech-at-shippensburgafter-violating-terms-of-2004-settlement-university-once-againdismantles-unconstitutional-speech-code/.

[17] *See* Settlement Agreement, *Speech First, Inc. v. Schlissel*, No. 18-cv-11451 (E.D. Mich. Oct. 25, 2019), https://speechfirst.org/wp-content/uploads/2019/10/Settlement-Agreement-signed.pdf.

The Fourth Circuit's opinion below was alert to these sorts of hijinks: "Faced with a suit challenging a potentially or even very probably unlawful practice, a defendant may freely litigate the case through the preliminary injunction phase . . . . And when the court confirms the likely merit of the plaintiff's claim, the government will have ample time to cease the challenged conduct, moot the case, and avoid paying fees." *Stinnie*, 77 F.4th at 210. In this very case, the government intentionally mooted the case to avoid fees, deliberately structuring the policy change "so that it would result in the pending litigation being dismissed, relieving the government's obligation to incur costly legal fees." *Id.* (quotation marks omitted).

The availability of attorney's fees will not completely prohibit governments from strategically mooting cases. But it will make the practice pricier, thereby protecting constitutional rights and reducing unnecessary litigation.

C. Removing the prospect of attorney's fees will encourage unnecessary litigation and appeals.

Attorney's fees do not just incentivize civil-rights litigation; they deter unnecessary litigation. Like damages awards, attorney's fees "significantly"

dissuade "civil rights violations in the future." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986). Sections 1983 and 1988 are "designed to deter civil rights violations and encourage access to the courts to redress often economically unviable injuries to fundamental rights." *Bravo v. City of Santa Maria*, 810 F.3d 659, 668 (9th Cir. 2016) (citing *City of Riverside*, 477 U.S. at 574–77).

Without the threat of fees, governments will feel emboldened to cross constitutional lines and more willing to roll the dice in litigation. *Amicus* FIRE has encountered this first-hand in its work with public colleges and universities.

Many public colleges continue to retain constitutionally deficient speech codes, even when the law is clear.[18] These policies tend to be vaguely worded, overbroad, or both. The restrictions grant campus administrators discretion to silence or punish

[18] FIRE's latest report, *Spotlight on Speech Codes 2024*, reveals that eighty-five percent of the 489 institutions surveyed maintain either a "severely restrictive" speech policy that "clearly and substantially restricts protected speech" or a policy that could easily be applied to suppress or punish protected expression. *Spotlight Report* at 1, https://www.thefire.org/sites/default/files/2024/01/Speech%20Code%20Report_2024_final.pdf. This includes public institutions, which should be upholding the First Amendment.

a stunning range of student speech the administrators may deem inconvenient, disagreeable, objectionable, or simply unwanted—everything from satire and art to political debate. Administrators will even censor protected speech in the same breath that they acknowledge doing so is unconstitutional.[19]

Many colleges, for instance, prohibit offensive expression irrespective of whether it constitutes actionable obscenity, defamation, or harassment. Delaware State University bans use of its information technology systems—including the campus Wi-Fi network—in ways that would "cause offense to others" or result in the university's "embarrassment."[20] The University of Texas at San Antonio likewise prohibits posting signs that contain "vulgar" material, without limiting this restriction to speech unprotected by the First Amendment.[21] These are not isolated examples. Lake Superior State University prohibits "postings deemed offensive, sexist, vulgar, discriminatory or

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[19] Press Release, FIRE, *LAWSUIT: FIRE sues Texas university president illegally blocking charity drag show* (March 24, 2023), https://www.thefire.org/news/lawsuit-fire-sues-texas-university-president-illegally-blocking-charity-drag-show.

[20] *Spotlight Report*, *supra* n.18, at 6.

[21] The Univ. of Texas at San Antonio, *9.09 University Posting of Materials* (Nov. 29, 2023), https://www.utsa.edu/hop/chapter9/9-9.html.

suggestive."[22] Portland State University prohibits "sexual or derogatory comments."[23] Alabama A&M University's policies ban "[e]xplicit or degrading verbal comments" and "[i]nsulting or obscene comments or gestures."[24] And the University of Massachusetts Lowell has adopted rules prohibiting use of its technology resources to transmit "offensive material."[25]

On occasion, public university policies go so far as to prohibit political speech, which this Court has long considered to lie at the core of the First Amendment's protection. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). For example, the University of Alaska Anchorage's policy governing e-mail and other

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[22] Lake Superior State Univ., *Posting Policy*, https:// www.lssu.edu/campus-life/stay-informed/student-handbook/#toggle-id-5.

[23] Portland State Univ., *Prohibited Discrimination & Harassment Policy* at 3 (Apr. 14, 2021), https:// drive.google.com/ file/d/14E3p-c2qunpA6H3-GFGLmEcL0nxovajc/view.

[24] Alabama A&M Univ., *Procedure 6.10: Non-Discrimination and Anti-Harassment Policy* at 2 (June 5, 2012), https:// www.aamu.edu/about/policies-procedures/_documents/6.10-non-discrimination-and-anti-harassment-policy.pdf.

[25] Univ. of Massachusetts Lowell, *Acceptable Use Policy* at 3 (Oct. 1, 2016), https://www.uml.edu/service/Apps/HR/ PolicyPortal/Policies/Download?id=12.

information-technology systems bans "[c]ontent related to partisan political activities."[26]

The mere existence of these policies (and the concomitant threat of discipline) chills student expression. Even worse, officials are actively *enforcing* these unconstitutional policies. Since its founding in 1999, FIRE has received thousands of reports of censorship on public college and university campuses. FIRE has successfully defended student and faculty rights in more than six hundred cases, nationwide.[27]

FIRE directly litigates cases, yet sometimes all it takes to change a public entity's mind is a strongly worded letter. But that's because that letter is backed by the implicit threat of litigation, including the potential for attorney's fees. Last year, FIRE wrote the University of Colorado, Boulder, explaining that forcing faculty members to agree with its "diversity, equity, and inclusion" statement violated the First Amendment. The university responded, agreeing to implement FIRE's suggested changes, including

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[26] Univ. of Alaska—Anchorage, *Acceptable Use Policy*, https://www.uaa.alaska.edu/about/administrative-services/policies/information-technology/acceptable-use.cshtml.

[27] *See All Cases*, https://www.thefire.org/cases/?limit=all.

incorporating diversity of thought and the value of different perspectives into its framework.[28]

Sometimes these letters can change a policy in mere days. Last October, FIRE wrote the City of Groveport, Ohio, explaining that its ban on "faith based items" and "socially offensive language" at its annual Apple Butter Day Festival violated the First Amendment – and just two days later, it agreed to reconsider, and to expressly permit the items at the festival.[29] These letters can also result in amicable collaborations. In Bellaire Beach, Florida, FIRE confronted a city ordinance banning "political" or "organized" gatherings on public property, closing off all public spaces—parks, sidewalks, streets—to even small political protests or rallies. In response the city quickly pledged to amend its ordinance, and it worked

[28] *University of Colorado, Boulder: DEI Statement Required for Faculty Positions—Case Overview*, https://www.thefire.org/cases/university-colorado-boulder-dei-statement-required-faculty-positions.

[29] *After FIRE's intervention, Ohio city lifts ban on sale of 'faith based items' at Apple Butter Day festival*, FIRE (Oct. 13, 2023), https://www.thefire.org/news/after-fires-intervention-ohio-city-lifts-ban-sale-faith-based-items-apple-butter-day-festival.

with FIRE over the next months to craft a new ordinance that protects First Amendment rights.[30]

We could go on.[31] But the point is simple: When constitutional violations cost something, governments are less likely to maintain or enforce unconstitutional policies. Removing the cost of litigation would greenlight governments to defend even the most blatantly unconstitutional policies. They could litigate and appeal cases all the way to this Court. As long as they don't go beyond the preliminary-injunction stage, they're off the hook for fees. Conversely, with fees as a possibility, governments are more likely to come to the table and discuss how to avoid or resolve

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[30] *After FIRE's Intervention, Florida city ditches unconstitutional restrictions on political protests*, FIRE (Jan. 25, 2024), https://www.thefire.org/news/after-fires-intervention-florida-city-ditches-unconstitutional-restrictions-political-protests.

[31] *See, e.g.*, *Twin Ridge Elementary School: Staff and students compelled to participate in the Pledge of Allegiance—Case Overview*, https://www.thefire.org/cases/twin-ridge-elementary-school-staff-and-students-compelled-participate-pledge-allegiance; *Bay City, MI, implements rules restricting public comments at city commission meetings—Case Overview*, https://www.thefire.org/cases/bay-city-mi-implements-rules-restricting-public-comments-city-commission-meetings; *Bristol, TN, restricts protected speech on the city's social media pages—Case Overview*, https://www.thefire.org/cases/bristol-tn-restricts-protected-speech-citys-social-media-pages.

litigation. Not only does this serve Section 1988's core purposes, it conserves judicial resources.

CONCLUSION

Letting government defendants escape fees after defeat at the preliminary-injunction stage grants them a "get out of jail free" card at the start of each case. It would both give government the upper hand and flatly contradict Section 1988's animating purpose. Attorneys should have a reason to take First-Amendment cases and shouldn't go in knowing the deck is stacked against them. This Court should therefore affirm the decision below and preserve the availability of fees in preliminary-injunction cases.

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